

1 UNITED STATES BANKRUPTCY COURT  
2 DISTRICT OF DELAWARE  
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5 In re: :  
: Chapter 11  
6 W.R. GRACE & CO., :  
et al., : Case No. 01-01139 (KG)  
7 :  
Reorganized Debtors. : (Jointly Administered)

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12 United States Bankruptcy Court  
13 824 North Market Street  
14 Wilmington, Delaware  
15 May 3, 2017  
16 11:02 a.m. - 11:38 a.m.  
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21 B E F O R E :  
22 HON KEVIN GROSS  
23 U.S. BANKRUPTCY JUDGE  
24

25 ECRO OPERATOR: GINGER MACE

1 HEARING re Objection to Claim No. 603 by Jim Wright

2 (Substantive) [Filed: 4/3/17] (Docket No. 32847).

3  
4 HEARING re Motion for Entry of an Order Authorizing the  
5 Reorganized Debtors to Exceed the Page Limit Requirement for  
6 Omnibus Memorandum in Support of Granting the Reorganized  
7 Debtors' Summary Judgment Motion, Denying Norfolk Southern's  
8 Cross-Motion and Disallowing Norfolk Southern's  
9 Indemnification Claim [Filed: 3/13/17] (Docket No. 32840).

10  
11 HEARING re Motion of Norfolk Southern Railway Company to  
12 Exceed Page Limitation for Reply Brief [Filed: 4/11/17]  
13 (Docket No. 32852).

14  
15 HEARING re Status Hearing Regarding Motion for Summary  
16 Judgment Pursuant to Fed. R. Bankr. P. 7056 for Partial  
17 Allowance and Partial Disallowance of Claim No. 7021, Filed  
18 By Norfolk Southern Railway Company [Docket No. 929575] and  
19 Norfolk Southern Railway Company's Cross-Motion for Summary  
20 Judgment Allowing Claim No. 7021 [Docket No. 32825] and  
21 related matters.

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24  
25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 THE LAW OFFICES OF ROGER HIGGINS, LLC

4 Attorneys for the Reorganized Debtor

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6 BY: ROGER HIGGINS

7 DAVID GRASSMICK

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10 Attorneys for the Reorganized Debtor

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12 BY: JAMES O'NEILL

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14 POTTER ANDERSON & CORROON LLP

15 Attorneys for Norfolk Southern

16

17 BY: SCOTT BALDWIN

18 R. STEPHEN MCNEILL

19

ALSO PRESENT TELEPHONICALLY:

20

21 ROBERT M. HORKOVICH

22 ADAM PAUL

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning, everyone. Thank you.

4 You may be seated.

5 MR. O'NEILL: Good morning, Your Honor.

6 THE COURT: We're here in W. R. Grace. Mr.

7 O'Neill, good morning.

8 MR. O'NEILL: Good morning, Your Honor. James  
9 O'Neill, Pachulski Stang Ziehl & Jones, appearing on behalf  
10 of the Reorganized Debtors, W. R. Grace.

11 THE COURT: Yes.

12 MR. O'NEILL: It's a pleasure to see you. We  
13 don't get to see you that often in this matter.

14 THE COURT: No, you don't. We haven't seen one  
15 another for a while.

16 MR. O'NEILL: But that because you're working hard  
17 behind the scenes.

18 THE COURT: All right. Go ahead.

19 MR. O'NEILL: Your Honor, joining me at counsel  
20 table today is my co-counsel Roger Higgins and also David  
21 Grassmick.

22 THE COURT: Welcome, gentlemen. Welcome.

23 MR. O'NEILL: You entered a pro hoc order  
24 yesterday for Mr. Grassmick, and we do --

25 THE COURT: Yes.

1 MR. O'NEILL: -- appreciate that.

2 THE COURT: My pleasure.

3 MR. O'NEILL: Also in the courtroom with us this  
4 morning is our client, Richard Fink who's the vice-president  
5 and associate general counsel of W.R. Grace.

6 THE COURT: Mr. Fink, welcome to you too. I also  
7 welcome Mr. Baldwin and Mr. McNeill.

8 MR. BALDWIN: Thank you, Your Honor.

9 THE COURT: Good to have you here.

10 MR. BALDIN: Good morning.

11 MR. MCNEILL: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. O'NEILL: Your Honor, what's on the -- what's  
14 still on the agenda for today is item number 4, which is a  
15 status hearing on competing motions for summary judgment  
16 with respect to a claim filed by Northern -- by Norfolk  
17 Southern. And I wanted to just let the Court know that Mr.  
18 Higgins is going to be presenting our part of the status  
19 report --

20 THE COURT: All right.

21 MR. O'NEILL: -- and discussing matters with the  
22 Court. And so I will turn the podium over to him.

23 THE COURT: All right. Thank you, Mr. O'Neill.

24 MR. O'NEILL: Thank you.

25 MR. HIGGINS: Good morning, Your Honor. Roger

1 Higgins for the Reorganized Debtors.

2 THE COURT: Yes, Mr. Higgins. Good to have you  
3 here.

4 MR. HIGGINS: So we are now -- just to give you a  
5 frame of reference -- we're now down to eight claims left  
6 against W.R. Grace, and it befits there being the last date  
7 of about 12,000 of them, these are the ones that are shall  
8 we say not going quietly into the night.

9 THE COURT: All right.

10 MR. HIGGINS: We do have one that was noticed up  
11 for today for Jimmy Wright that was an employment-based  
12 claim. We have been able to settle that. That claim  
13 objection will be withdrawn here in the next couple of weeks  
14 once payment's been made.

15 THE COURT: All right.

16 MR. HIGGINS: So we have today Norfolk Southern's  
17 claim which is a railroad indemnity claim. I think it's  
18 been pretty well explained in the papers, perhaps even  
19 overly exhaustively so. But there are, as Mr. O'Neill said,  
20 two competing motions for summary judgment, one filed by the  
21 Reorganized Debtors and one filed by Norfolk Southern.

22 In the course of the briefing, it became clear to  
23 the Reorganized Debtors that there was a gating issue here,  
24 which is the admissibility of certain testimony by one  
25 Lester Kirkland. And also the issue of whether the Court

1 should strike two declarations that were filed on January  
2 27th by Norfolk Southern because of a series of hearsay and  
3 foundation and other evidentiary problems.

4 And it's our belief, Your Honor, that if the Court  
5 were to address those two items first before attending to  
6 summary judgment that depending on how you rule, it could  
7 clear the way to disposing of this claim more quickly than  
8 otherwise. If not, I think that, you know, there's -- there  
9 are other paths to take that maybe take a little bit longer.  
10 And in the Reorganized Debtor's view would ultimately reach  
11 the same conclusion.

12 THE COURT: Do you need argument on the --

13 MR. HIGGINS: Your Honor, what we would propose --

14 THE COURT: -- on the motion?

15 MR. HIGGINS: -- what we would propose is that you  
16 hear argument on the hearsay and to the extent necessary on  
17 the motions to strike. And from there, depending on how you  
18 rule, we could then set the competing summary judgments for  
19 oral argument. That said, I will note that Norfolk Southern  
20 I believe and I don't want to put too many words into  
21 counsel's mouth, but I believe that Norfolk Southern is  
22 essentially saying now that as to their summary judgment  
23 motion that there's, you know, competing facts or facts  
24 immaterial to -- material facts in dispute.

25 We believe that that's not the case, that you can

1 go forward on the Reorganized Debtor's summary judgment  
2 motion, but that it would be easier to do so once you've  
3 dealt with the hearsay and the motion to strike.

4 THE COURT: All right.

5 MR. HIGGINS: We do have one last issue and that  
6 is a potential witness, a train master named Chapman, whom  
7 we identified in our pleadings as somebody who had made a  
8 rather telling admission on behalf of Norfolk Southern.  
9 We've made inquiries with Norfolk Southern as to whether Mr.  
10 Chapman is available to testify and if he is, you know, of  
11 sufficiently good health and young enough, that we don't  
12 have to worry about perpetuating his testimony.

13 We don't believe we need to go forward with  
14 discovery at this point before we deal with summary  
15 judgment, but we do want to obtain assurances with Norfolk  
16 Southern that he is indeed in good health. I'm --  
17 unfortunately, I do have to report that as of today, Norfolk  
18 Southern has not to the best of our knowledge ever contacted  
19 Mr. Chapman and has merely told us they have no reason to  
20 believe that he's in ill health. I think we would rather  
21 see a more positive statement that Mr. Chapman is available.

22 THE COURT: All right.

23 MR. HIGGINS: And thank you, Your Honor.

24 THE COURT: Thank you, Mr. Higgins.

25 Mr. Baldwin, it's good to see you.



1 MR. BALDWIN: Good to see you, Your Honor. It's  
2 been a long time.

3 THE COURT: Yes, it has.

4 MR. BALDWIN: This is about kaolin. You know we  
5 have kaolin road? Well, it turns out kaolin is a powdery  
6 substance that they dig out of the ground, and it is used to  
7 make various ceramic-type products. And in South Carolina,  
8 there was a Grace facility -- there is I think still -- that  
9 mined kaolin and loaded it up into Norfolk Southern hopper  
10 cars. There was an accident that occurred back in 1998,  
11 January of 1998 -- actually two accidents where a Norfolk  
12 Southern employee fell off the car and, you know, one of the  
13 issues is was this because of any contributing negligence of  
14 Grace in overflowing a car and putting this slippery stuff  
15 on there.

16 THE COURT: Right.

17 MR. BALDWIN: There are all kinds of factual  
18 issues that have to do with where was the car located, was  
19 there any FILLA case brought solely against Norfolk Southern  
20 by the employee and he won a jury verdict against Norfolk  
21 Southern in Georgia. He didn't join Grace. Grace was  
22 invited to enter the case by Norfolk Southern, and they  
23 declined.

24 And there are numerous indemnity agreements  
25 between the railroad and Grace about -- that applied

1 different circumstances. Some are sort of no fault  
2 indemnifications that they would have to indemnify us even  
3 if they're not at fault. I don't want to characterize it  
4 too much because we're not getting into it. I want to get  
5 into the -- I'm just stating this as background.

6 THE COURT: Yes.

7 MR. BALDWIN: But some of the issues have to do  
8 with really whether -- the real issue's whether these  
9 indemnifications kick in and require them to pay either 100  
10 percent of the damages that were paid to this gentleman or  
11 50 percent or something -- some other number.

12 This claim has been sitting for virtually forever.  
13 We filed a claim in March of 2003.

14 THE COURT: Okay.

15 MR. BALDWIN: They filed an objection six and a  
16 half years later in July of 2009, so they weren't in any big  
17 fat rush. Mr. Kirkland is the employee, and he  
18 unfortunately passed away in October of 2009.

19 THE COURT: Okay.

20 MR. BALDWIN: He's the employee who --

21 THE COURT: Who was injured?

22 MR. BALDWIN: Yes.

23 THE COURT: Yes.

24 MR. BALDWIN: And we worked for quite a long time  
25 to try to come up with a stipulated basis on which to

1 provide the Court agreed facts that you could use to rule on  
2 the indemnification rights back and forth. We weren't able  
3 to do that. We finally agreed that either party could rely  
4 on the trial record from the Georgia proceeding, which we  
5 had supplied to W.R. Grace.

6 W.R. Grace essentially repudiated that agreement  
7 when it filed for summary judgment on October 31, 2016. And  
8 in their opening papers, they made the same argument that  
9 they're talking about now, which is whether the -- sorry,  
10 it's allergies; tree pollen season--

11 THE COURT: Yes, it is.

12 MR. BALDWIN: -- whether the Kirkland testimony  
13 would be allowed into the record. And they took the  
14 position in their opening papers -- and this is robustly  
15 briefed -- that the Kirkland testimony could -- that any  
16 testimony in the record could come in for them, but could  
17 never come -- but could not come in for us, could help them  
18 but could not help us.

19 THE COURT: Okay.

20 MR. BALDWIN: And not only is that not what we  
21 agreed, but it required a while set of briefing. They have  
22 now -- we filed a cross-motion for summary judgment and  
23 their papers are -- well, Mr. --

24 THE COURT: I have the -- yes, I have the binder  
25 and I --

1 MR. BALDWIN: I hope you got them two-sided as we  
2 have because I tell my secretary I'm too old to carry  
3 single-sided and that issue's going to come up a little bit  
4 later.

5 THE COURT: That's why you have Mr. McNeill.

6 MR. BALDWIN: Well, yeah. Yeah, but even Mr.  
7 McNeill couldn't handle it if it was single-sided.

8 THE COURT: No, that's right.

9 MR. BALDWIN: You know, old people like us  
10 certainly couldn't handle it, and I mean no disrespect to  
11 the Court, but --

12 THE COURT: No, of course.

13 MR. BALDWIN: -- but I'm going to come back to  
14 that. They filed about 200 -- the briefing is 210 pages.  
15 They filed 144 pages of briefing on this simple summary  
16 judgment motion, and some of their briefing consisted of  
17 attachments which were repetitive briefs on some of these  
18 issues. So the attachments were A, B, C which were  
19 additional briefs, so in addition to declarations that you  
20 would ordinarily see.

21 Finally, on March 31st, they filed their hearsay  
22 motion, which Mr. Higgins was just talking about, which was  
23 actually a redux of the admissibility issues that had been  
24 briefed robustly by the parties throughout. And they have  
25 decided that their best chance is to pull this hearsay

1 motion out and the motion challenging out affidavits. The  
2 affidavit motion you'll see includes such objections as  
3 objection to this because they talked about facility but  
4 they didn't use -- the affiant did not use the same  
5 definition of facility that was contained in the  
6 indemnification agreement. So that testimony can't be  
7 considered by the Court.

8 I hope not be conveying my view about the validity  
9 of those objections too much. But with regard to this, we  
10 think that they put in counter affidavits to ours and so we  
11 think they're basically with respect to the indemnification  
12 issue, you have a couple of facts. You know, where were  
13 these -- where did the especially the second accident occur?  
14 Who car was it? On whose property was it? Based on the  
15 descriptions in the indemnification agreements, is it  
16 covered or is it not covered, and so forth.

17 So where was it, who was involved, whether Grace  
18 was negligent, those are the principal arguments. And so we  
19 say we think you have basically countered our facts by  
20 raising a question of facts. So we ought to go to trial.  
21 So rather than going to trial, what they're trying to do is  
22 come at you with two rounds -- two bites of the apple. They  
23 want you to pull out these discreet evidentiary issues, but  
24 they're not willing to conceive that if the evidentiary  
25 issues go against them and that the affidavits come in and

1 that the Kirkland testimony comes in, that there still would  
2 be questions of fact.

3 So what they're asking you to do is take this huge  
4 pile of briefing, consider it, pull out one tiny portion and  
5 then give them their first bite and then come back for a  
6 second bite where the Court has to consider all these papers  
7 again because our papers are -- the issues are intertwined.  
8 We have simply said we've already briefed this. See pages  
9 da-da-da-da-da-da. So you're going to have to go back and  
10 look at all these papers anyway.

11 So the question is it's a matter of judicial  
12 economy and the economy for the parties should we have to do  
13 this 210-page briefing extravaganza and then have them pull  
14 out just the nose of the elephant for your close inspection  
15 and leaving the rest of the elephant for a bigger bite. We  
16 don't think they can honestly look Your Honor in the eye and  
17 agree that we would not be entitled to go to trial if they  
18 prevailed on these motions because we would -- even if these  
19 affidavits were partly not considered and even if the  
20 Kirkland testimony was partly not considered, we would come  
21 up with other witnesses who would testify, although we think  
22 they've made it as difficult as possible for us by waiting  
23 until after Mr. Kirkland passed away and then saying, oh, my  
24 goodness, Mr. Kirkland's passed away so we're going to  
25 object to your use of his testimony but not ours.

1           So we think it's inefficient for the Court. We'll  
2       do whatever the Court wants, but we think since we've had to  
3       go to the expense of all this, unless they can tell you why  
4       you shouldn't which they haven't, then we should either  
5       conceded that these evidentiary issues were resolved in  
6       summary judgment and go to trial or argue the whole thing  
7       together so our client doesn't have to go through recidivist  
8       expenses.

9           THE COURT: So in other words, what you're saying,  
10      Mr. Baldwin, is rather than have an argument first on the  
11      evidentiary issues and then have a hearing on summary  
12      judgment, going to have a hearing on the evidentiary issues  
13      and summary judgment?

14      MR. BALDWIN: Yes, all together.

15      THE COURT: All right.

16      MR. BALDWIN: Which is what the Court ordinarily  
17      would do when you would be --

18      THE COURT: Right.

19      MR. BALDWIN: -- considering a summary judgment  
20      motion. This is not even a very large claim really in the  
21      scheme of things, W.R. Grace, I think, it's about a \$1.5  
22      million settlement. But going back to 2001, under the plan,  
23      of course, there's interest on the claim so I forget what it  
24      is. It's two or \$2 million now --

25      THE COURT: The interest alone would be large.

1 MR. BALDWIN: It's the best investment our client  
2 could find right now, Your Honor --

3 THE COURT: Yes.

4 MR. BALDWIN: -- is to keep it in the -- keep our  
5 funds undeposited with W.R. Grace.

6 THE COURT: Why the claim was filed in 2003? Why  
7 is it? And it's only now being considered by the Court on  
8 summary judgment?

9 MR. BALDWIN: I think Your Honor has to ask W.R.  
10 Grace about that. They -- you know, we had some talks over  
11 the years, but they had other things to -- other fish to fry  
12 and they waited six years even to file an objection.

13 THE COURT: Yes.

14 MR. BALDWIN: And in the meantime, our guy died  
15 right after that. So I don't think that it's really  
16 excusable, but there you have it. And I would like to say  
17 something about Mr. Chapman.

18 THE COURT: Yes.

19 MR. BALDWIN: And it has to do with -- a little  
20 bit has to do with these binders I mentioned. What they  
21 also want to do is pull out -- they say they don't want to  
22 call it discovery because then we would get discovery. So  
23 they don't want to call it discovery. They just want to  
24 take his deposition. And we said, well, if you're going to  
25 take his deposition, let's enter into a deposition schedule



1 and then we get to take depositions. And they said no, no,  
2 no. You're missing our point. We don't want discovery. We  
3 just want a statement from him under oath with a court  
4 reporter because possibly he could be owed.

5 What they say is -- and I hope that this doesn't  
6 offend you as it does me -- he's retired and he could be 65  
7 or thereabouts and therefore, we have to take his deposition  
8 because he could drop dead any moment. Now, I don't think  
9 I'm the only one around 65 in this courtroom.

10 THE COURT: No, you're not, Mr. Baldwin. We're  
11 the same age.

12 MR. BALDWIN: And I don't think that's proof.  
13 They have not filed a motion to preserve his testimony, so  
14 why are we talking about this. They don't have any reason  
15 to believe that he is not in good health, and what they --  
16 and what we said is what makes you think he's not in good  
17 health, and they said because he might be 65. That's  
18 nothing. If you want to consider this now, that's no  
19 evidence at all.

20 What we said to them in return is because this  
21 accident happened in 1998, most of the witnesses would be  
22 retired and nearly at their death's door of 65 as well. So  
23 tell us who your witnesses are with knowledge and how old  
24 they are, let's set up a briefing schedule, and let's do it.  
25 But we're not going to just pull it out and have you do Mr.

1 Chapman.

2 And I will tell you we've explained this many  
3 times to Mr. Higgins and I'm sorry he doesn't understand  
4 because I must have been inarticulate. But when we were  
5 briefing our cross-motion for summary judgment and we were  
6 looking for affidavits, we looked for Mr. Chapman. We had  
7 our people reach out to him. They even went to his house  
8 and left him a note. So to say we haven't tried to contact  
9 Mr. Chapman is wrong, and we've conveyed this to them. We  
10 didn't see any bodies. We didn't see anything. He just is  
11 retired and probably didn't want to talk to us. But we  
12 don't one way or the other, but if it applies to Chapman, it  
13 applies to every one of these other unnamed people.

14 The main witness on their side is a guy named Mr.  
15 Woods. He's also passed away along with Mr. Kirkland. So  
16 we want to know if they're not going to wait until the  
17 summary judgment's decided, then let's do discovery. If  
18 they're going to press for Chapman, then we want all their  
19 guys, and we're going to give them an expedited discovery  
20 request and get them. And if the Court wants to consider  
21 this with no motion, I'm happy to rely on my oral comments.

22 THE COURT: All right.

23 MR. BALDWIN: Thank you, Your Honor.

24 THE COURT: Yes, Mr. Baldwin. Thank you. Mr.  
25 Higgins, anything further?

1 Oh, Mr. Chapman, let me just say there are  
2 mechanisms to take his deposition within the rules and you  
3 ought to follow those. I don't think that Norfolk Southern  
4 has an obligation to provide you with information about Mr.  
5 Chapman. If you want to subpoena him or whatever it is you  
6 want to do, I think you ought to do that.

7 MR. HIGGINS: Your Honor, all we were looking for  
8 with respect to Mr. Chapman -- and I must say that counsel  
9 was somewhat more forthcoming this time than he has been in  
10 the past -- in the -- all we wanted to know is is he in good  
11 health. That's the -- and I think if you were in good  
12 health, well, that would be the end of it from our  
13 perspective. We have no interest in taking him, quote,  
14 unquote, out of turn. We have gone back and looked at each  
15 one of our witnesses, the ones we believe that Norfolk  
16 Southern would be interested in if, indeed, we get that far,  
17 and we're happy to report they were all healthy.

18 They were all -- at least two of them are still  
19 working at Grace. They're not yet 65. I'd say that as  
20 somebody who is now in his seventh decade along with others.  
21 And the one gentleman who is retired is in fine health.

22 THE COURT: All right.

23 MR. HIGGINS: We just wanted to know is he okay.

24 THE COURT: Okay.

25 MR. HIGGINS: And, you know, we just haven't

1       gotten a very clear answer to that.

2               THE COURT: All right. And why so long? Help me  
3 out on that --

4               MR. HIGGINS: Well --

5               THE COURT: -- because I haven't been involved in  
6 this case all along.

7               MR. HIGGINS: Sure. And to be honest, Your Honor,  
8 I wasn't going to go into that, you know, as this is a  
9 status conference, but I'm happy to discuss that. So if you  
10 look at the W.R. Grace's bankruptcy, it is one of the  
11 longest. I don't know that it's number one, but it's  
12 certainly in the top three or four longest bankruptcies from  
13 petition date 4/2/01 to the effective date of February 3rd  
14 of 2014.

15              THE COURT: Right.

16              MR. HIGGINS: And during the course of that, there  
17 were as I alluded to earlier, you know, something on the  
18 order of 12,000 non-asbestos claims filed. We are now down  
19 to eight, as I said, Norfolk Southern being one of those.  
20 The -- so the history of this is a little bit more fulsome  
21 than counsel was alluding to.

22              So the trial -- the accidents happened in January  
23 of 1998.

24              THE COURT: Right.

25              MR. HIGGINS: There was one accident on Friday,

1 the 23rd, where Mr. Kirkland apparently fell off of a train  
2 and hurt himself. He was sent back to work on the 26th  
3 where he apparently slipped on a railcar that may or may not  
4 have been from Grace. We don't really know. And but even  
5 if it had come from Grace, then, you know, we think that  
6 it's not covered by the indemnity.

7 And Mr. Kirkland never worked again. He filed  
8 suit in July of 1998 against Norfolk Southern. Norfolk  
9 Southern took Mr. Kirkland's deposition -- and I will add  
10 that, to back up, that in the accident reports that Mr.  
11 Kirkland filled out in January 23rd and 26th, he reported  
12 that these were Grace railcars. In the Norfolk Southern  
13 accident report, their investigation -- they only did one  
14 for the 23rd that we're aware of -- it identified the  
15 railcar as having come from another railcar or another  
16 kaolin manufacture called J.M. Huber.

17 And the one on the 26th as far as we are aware,  
18 Norfolk Southern despite its own rules and regulations on  
19 this point never produced an accident report for this  
20 January 26th incident. Fast forward to July of 1998, so  
21 Norfolk Southern is long since on notice about Grace's  
22 potential involvement in their view of the world.

23 In September of 1999, Grace receives a letter from  
24 Norfolk Southern's Georgia trial counsel, the first time  
25 Grace ever knew about this. Grace for reasons that we could

1 spend a long time on, but will become abundantly clear  
2 declined to join this going -- these are accidents which  
3 occurred on Norfolk Southern facilities -- Norfolk Southern  
4 rail sightings miles away the Grace plant, hours after the  
5 cars had been turned over. These are all non-disputed  
6 facts --

7 THE COURT: Okay.

8 MR. HIGGINS: -- when they, you know, view --  
9 perhaps take a view of what they mean, but the facts are  
10 uncontroverted here. So Grace declined to be involved.  
11 Norfolk Southern never interpleaded or sought to join Grace.  
12 They could have done so under the applicable Georgia rules  
13 just like applicable federal rules. The trial was held in  
14 late '00 and I believe that there was a judgment against  
15 Norfolk Southern of over \$1.9 million that was later settled  
16 for 1.5, and this was in January of '01.

17 Well, Grace filed bankruptcy in April of '01 --

18 THE COURT: Right.

19 MR. HIGGINS: -- which brought all litigation and,  
20 you know, to be very honest, I would have to ask Mr. Fink  
21 how many hundreds of cases were ongoing at that point, but  
22 they all came to a screeching halt. The claim's bar date  
23 was set for March 31st of '03. Norfolk Southern filed their  
24 claim on March 30th I think it was in -- and the Reorganized  
25 -- well, then Debtors undertook a program to start knocking

1 claims out. And Norfolk Southern's claim came up in 2007,  
2 and Grace identified this claim as one that would have been  
3 ripe for mediation and sought to go to mediation with  
4 Norfolk Southern. The talks died.

5 So then in the summer of '09, July of '09, the  
6 Reorganized Debtors filed their objection. Now  
7 understanding that counsel has made a big deal out of Mr.  
8 Kirkland passing away in I believe it was September of '09,  
9 Norfolk Southern was on clear notice as early as two years  
10 before that this was not a claim that was going to go  
11 quietly into the night. It was not a claim that was going  
12 to be allowed by Grace without there being some discussion,  
13 some litigation, some arbitration, some mediation.

14 And yet they didn't see fit to see if Mr. Kirkland  
15 -- how Mr. Kirkland was doing, and this is if you dig deeply  
16 enough into this trial record, you realize that Mr. Kirkland  
17 died of colon cancer, and he'd already had surgery in 2000  
18 for colon -- for colon issues. I mean Norfolk Southern was  
19 very clearly on notice about Mr. Kirkland's ill health and  
20 they did nothing to try and find him, to perpetuate his  
21 testimony under Rule 27 or Bankruptcy Rule 7027.

22 In 2012 and 2013, the two sides did engage in  
23 discussions about using the trial record about whether how  
24 specifically the stipulation was to be and to be very blunt,  
25 counsel mischaracterized the end of those discussions

1 because there was never an agreement on anything. They were  
2 settlement talks that went nowhere. They were settlement  
3 talks again in 2015. Again, a discussion in 2015 about  
4 using facts. No progress.

5 It was in that light that Grace took a step back  
6 and evaluated the entire claim, did some significant factual  
7 investigation, realizing that, you know, from Grace's  
8 perspective, the case was shall we say considerably stronger  
9 than at first impression. And it was in that light that we  
10 filed the summary judgment motion which said that with or  
11 without the FILLA record -- the FILLA trial record --

12 THE COURT: Yes.

13 MR. HIGGINS: -- Norfolk Southern has failed to  
14 carry its burden of proof. We don't have any more than  
15 that. And Norfolk Southern filed its response and its  
16 cross-motion January 27th advancing certain arguments as to  
17 why Mr. Kirkland's testimony in particular was to be  
18 admitted.

19 And it was in the fact of that briefing that the  
20 Reorganized Debtors understood I think more clearly. I wish  
21 that I has perfect foresight. I don't necessarily, nor does  
22 my client. At that point we realized that this issue of  
23 whether Mr. Kirkland's testimony is admissible for the  
24 purposes of Norfolk Southern carrying its burden of proof,  
25 that without that testimony, they cannot even under their



1 own theory carry the burden of proof.

2 We believe that even with that testimony that they  
3 will ultimately fail. We believe that the Court could rule  
4 in summary -- even with the testimony the Court would rule  
5 in summary judgment in the Reorganized Debtor's favor. But  
6 it's a cleaner, simpler task for the Court to separate the  
7 wheat from the chaff in terms of what facts are disputed and  
8 what facts aren't disputed.

9 The facts that are not disputed is Mr. Kirkland  
10 was on a railcar on January 23rd, presumably from J.M.  
11 Huber. There's been no evidence introduced otherwise. He  
12 fell in that railcar while it was attached to a Norfolk  
13 Southern-controlled train, after Norfolk Southern had taken  
14 consignment of the car, after Norfolk Southern had adjudged  
15 their car safe to run. These are unassailable facts found  
16 in that trail record that counsel is referring to.

17 And that railcar was at a Norfolk Southern-owned  
18 citing in Warrenville, South Carolina ten miles away from  
19 the Grace plant. Several hours after Grace consigned that  
20 railcar that had been adjudged safe to run -- or how about  
21 this, not unsafe to run since the conductor's rules talk  
22 about the cars being detached from the (indiscernible) or  
23 the trains when they are unsafe to run. So the car was  
24 adjudged not unsafe to run. And Mr. Kirkland was injured  
25 apparently and then sent back to work.

1           The next data point there is the railcar is picked  
2       up at the Grace plant on -- sometime in the morning of  
3       January 26th, the following Monday morning. Railcar is once  
4       again adjudged not unsafe to run, which we can discuss in  
5       some detail. The railcar is attached to a Norfolk Southern  
6       train. It goes away to the (indiscernible) Depot where Mr.  
7       Kirkland apparently injured himself again.

8           And it is our view and it has been Grace's view  
9       from the very beginning that those accidents fall way --  
10      well outside the scope of the indemnities under applicable  
11      law. And we are fully prepared. I'm happy to argue that  
12      all day long today, but what we saw an opportunity for the  
13      Court to be able to short circuit this rather voluminous bit  
14      of pleading or briefing. Over half of which by the way is  
15      the trial transcript from the FILLA trial --

16           THE COURT: Okay.

17           MR. HIGGINS: -- in that so.

18           THE COURT: All right.

19           MR. HIGGIN: You know, we will plead guilty to of  
20      having run a bit long in our briefs, but, you know, we've  
21      addressed that with the Court. So we think that, Your  
22      Honor, respectfully, if you are -- can rule on whether Mr.  
23      Kirkland's testimony should be admissible, which we believe  
24      it should not be. And if you take a proper view of the  
25      deformities, the weaknesses in those two declarations and

1 that's Messrs. Sharp and Connelly, that a lot of the chaff  
2 starts to fall away leaving the wheat behind and that we  
3 believe that then the Court can look at the remaining wheat,  
4 which is the undisputed facts and be able to come to a  
5 conclusion.

6 THE COURT: Would you like me to rule, make the  
7 evidentiary rulings without argument or do you want argument  
8 on that?

9 MR. HIGGINS: Your Honor, we'd be happy -- if you  
10 want to make that evidentiary ruling without argument, we're  
11 happy to do it that way.

12 THE COURT: All right.

13 MR. HIGGINS: Absolutely. And we're happy to do  
14 oral argument to make it easier for you to make this ruling,  
15 but we'd be highly pleased if you did it without oral  
16 argument.

17 THE COURT: All right. How about you, Mr.  
18 Baldwin? Do you want oral argument on the evidentiary  
19 issues?

20 MR. BALDWIN: If the Court's going to consider  
21 them separately, I don't really think we would need them. I  
22 think there's a lot of briefing. I think you're going to  
23 have to read all the briefs anyway.

24 THE COURT: Yes.

25 MR. BALDWIN: So I --

1 THE COURT: So you'd just as soon get here on the  
2 motion for summary judgment, argue the evidentiary issues as  
3 well as summary judgment?

4 MR. BALDWIN: Yes. Yes.

5 THE COURT: All right.

6 MR. HIGGINS: And just --

7 THE COURT: Well, here's what I need -- I think I  
8 need to read the papers

9 MR. HIGGINS: Okay.

10 THE COURT: -- to make that decision to see  
11 whether as Mr. Higgins suggests, that will make my task in  
12 the long run easier if I rule in Grace's favor on the  
13 evidentiary issues or if I should just hear the whole thing  
14 at one time, which I'm inclined to do. I'm inclined to hear  
15 the motions for summary judgment, the cross-motions for  
16 summary judgment, as well as your evidentiary objections at  
17 the same time. Just I think that might be the easier way,  
18 but let me look at the papers and make that decision. And  
19 then we can schedule you promptly for argument.

20 I assume you're ready to go to argument. You  
21 could go, you know, tomorrow if necessary.

22 MR. BALDWIN: Yeah, we probably could, Your Honor,  
23 but that's fine. I'm happy to do that. I just want to say  
24 that undisputed facts that supposedly -- that were recited  
25 are not undisputed and they're mostly pulled from the trial

1 record, which they say is inadmissible, so.

2 THE COURT: Okay. All right. Okay. I  
3 understand. And so let me look at the -- let me look at all  
4 of this because it may make sense for me to rule on the  
5 evidentiary issues first just so you know what your argument  
6 if that's a summary judgment argument.

7 MR. BALDWIN: Well, you know, it's possible, Your  
8 Honor. Since we briefed this initially on one set of  
9 assumptions, it's possible that we may need to file some  
10 sort of revised brief of now this motion came up at the end  
11 after we have briefed the whole thing for months.

12 THE COURT: Okay. In other words you --

13 MR. BALDWIN: You know, I just want to consider  
14 -- have an opportunity to consider how it affects the papers  
15 we've already put in after we get the Court's ruling.

16 THE COURT: All right. In other words, you may  
17 want to brief your summary judgment motion differently?

18 MR. BALDWIN: Yes, Your Honor.

19 THE COURT: Okay. All right.

20 MR. HIGGINS: Your Honor, we would have to see  
21 what they wanted to do --

22 THE COURT: Right.

23 MR. HIGGINS: -- before I make -- we make any  
24 decision about what we would want to do.

25 THE COURT: Okay. Well, let me go back and --

1 because frankly, I've looked at the briefs quickly, but I  
2 haven't really studied them as I have to do, you know, and  
3 decide whether I can rule on the evidentiary issues separate  
4 from the motions for summary judgment or we should just have  
5 argument on both. And I certainly understand both parties'  
6 positions on that, and I'll make that decision.

7 What else can we accomplish today, gentlemen? Mr.  
8 O'Neill?

9 MR. O'NEILL: I think we've accomplished all that  
10 we can for today on this matter, Your Honor.

11 THE COURT: All right. And -- all right. You'll  
12 be hearing from me on my decision how to proceed from this  
13 point forward. All right.

14 MR. O'NEILL: Thank you very much, Your Honor.

15 MR. BALDWIN: Thank you.

16 MR. HIGGINS: Thank you.

17 THE COURT: I thank you very much for being here  
18 and for your arguments and help. And you'll hear from me,  
19 and we'll stand in recess.

20 MR. O'NEILL: Thank you, Your Honor.

21 MR. BALDWIN: Thank you, Your Honor.

22 MR. HIGGINS: Thank you, Your Honor.

23 THE COURT: Thank you.

24 \* \* \* \* \*

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya Ledanski  
Hyde

Digitally signed by Sonya Ledanski Hyde  
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